NO. 3716

United States

Circuit Court of Appeals

For the Ninth District

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a Corporation, E. S. PEGRAM and GUSTON BORGLUM,

Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF DEFENDANTS IN ERROR

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Defendants in Error.

MOTION TO DISMISS WRIT OF ERROR

Comes now the above named defendants in error and, appearing specially for this purpose only, move the Court for an order dismissing the Writ of Error and Appeal herein for the reason that the plaintiff in error has not served any notice of her application for the Writ of Error upon all of the necessary parties interested in this appeal; has not served or made parties to the citation all the necessary parties to this proceeding and whose interests would be injuriously affected by the judgment of this Court; has not joined herein all of the parties to the suit who would be injuriously affected by a reversal of the judgment herein, and has not procured an Order of Severance in refer-

ence to others of the parties to this suit, and more particularly specified, to-wit:

I.

No notice of the application for the Writ of Error has ever been sevred by the plaintiff in error upon the United States Fidelity & Guaranty Company, surety on the non-resident cost bond furnished by the defendants in error upon the motion of the plaintiff in error in the District Court; nor has it been joined in this action, or in this proceeding; nor has there been any Summons and Severance as to it, or any Order of Severance made in reference to it, and no Citation directed to it in this proceeding.

II.

On the ground that no notice of the application for Writ of Error has ever been served by the plaintiff in error upon Sue Phillips Gates, third party claimant to the property involved in this suit; nor has she been joined in the action or in this proceeding; nor has there been any Summons and Severance as to her, or any Order of Severance made in reference to her, and no Citation directed to her in this proceeding.

III.

On the ground that no Order or Judgment of Severance as to this proceeding has been made or allowed in this cause as to Edward S. Curtis, co-defendant of the plaintiff in error in the Court

below, in which proceeding both the plaintiff in error and her co-defendant, Edward S. Curtis, were both jointly affected by the result in the lower court; and that the plaintiff in error is prosecuting this Writ of Error without any Order of Severance ever having been made or allowed thereto by the lower Court.

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Attorneys for Defendants in Error.

ARGUMENT ON MOTION TO DISMISS WRIT OF ERROR.

I.

The argument on the motion to dismiss the Writ of Error for the reasons assigned need be but very brief, for, in our judgment, our contention in that regard has been definitely settled by both the United States Courts and the State Courts of the State of Washington.

As we understand it, under

> Federal Judiciary Code, Chapter 7, Section 721, shown at page 1123, Vol. 5, Federal Statutes Anno.,

the United States Courts, acting in the same District as the State Courts, will follow the procedure of the State Courts. The question as to the neces-

sity of notice of the application for the Writ of Error, service of the Citation upon, procuring Summons and Severance of, and making a party to the appeal of the United States Fidelity & Guaranty Company, the surety on the non-resident cost bond of the defendants in error —filed in the Court below upon the motion of the plaintiff in error—has been definitely settled by the Supreme Court of Washington.

Shippen vs. Shippen, 91 Wash. 610, 158 Pac. 247.

This case is directly in point in the present prosecution of Writ of Error. The Court will notice by looking at the Shippen case that the Legislature of the State of Washington, in 1909, passed an Act directing the entry of a judgment against the surety, as well as the one primarily liable, upon a cost bond. That particular section of the Act of the Legislature is found in Section 496 of Remington & Ballinger's Code. The Court will notice by Section 496 of Rem. & Bal. Code, and also by the discussion in the Shippen case, supra, that the Supreme Court of the State of Washington specifically held that since it was now settled by the Statute that the Court should enter a judgment against the surety upon a forthcoming bond when entering a judgment against the principal, that the surety was a necessary party to the appeal. Of course, the failure to take the necessary and required steps to make the United States Fidelity & Guar-

anty Company, surety on the cost bond, party to this procedure, is fatal to the plaintiff's Writ of Error. And the same argument and position is taken in referance to the third party claimant, Sue Phillips Gates, for when she filed with the Marshal her third party claim and he then in turn included this in his return, this would constitute an appearance as to her. See also

Estes vs. Trahue, Davis & Co., 128 U. S. 229, 32 Law Ed. 437.

Todd vs. Daniels, 16 Peters 521, 10 Law Ed. 1054.

Masterson vs. Howard, 10 Wall. 416, 417, 418; 19 Law Ed. 953, 954.

Hardy vs. Wilson, 146 U. S. 179, 181; 36 Law Ed. 933, 934.

The U. S. Supreme Court has held in the Estes case specifically that the judgment is distinctly against the claimants and their sureties on the bond, and that, too, jointly; and, further, that all parties against whom the judgment is entered would be jointly affected by the judgment for costs in this case if a reversal were had.

As to the necessity of joining all parties to the suit who would be injuriously affected by a reversal of judgment, see

Wilson vs. Kiesel, 164 U. S. 248, 41 Law Ed. 422.

Am. S. & Tr. Co. vs. Clark, (C. C. A.) 83 Fed. 230.

St. Louis Un. El. Co. vs. Nichols, (C. C. A.)

91 Fed. 832.

Boyle vs. Stuttgard & A. R. R., (C. C. A.) 84 Fed. 9.

Ill. Tr. & Sav. Bk. vs. Kilbourne, (C. C. A.) 76 Fed. 883.

Kidder vs. Fidelity I. & D. Co., (C. C. A.) 105 Fed. 821.

Lewis vs. Sittel, (C. C. A.) 165 Fed. 157.

The Supreme Court of the State of Washington has held that the filing of the cost bond by the surety constituted an appearance in the case by that party, and that by the act of filing the bond it has submitted itself to the jurisdiction of the Court and has become a party to the case.

In addition, the United States Fidelity & Guaranty Company executed the replevin bond as the surety in this cause, and both the cost bond as a non-resident executed by them and the replevin bond constituted an appearance, under the holdings of the Supreme Court of the State of Washington, of that company in this cause.

II

The record discloses the fact that Edward S. Curtis was served with a notice to join in the application for the Writ of Error and a refusal by his attorneys only to join therein, but the record does not disclose that any Order of Severance has ever been entered by the District Court after this refusal—on the part of the attorney only—on his part to join in the Writ of Error; and, of course, the

record fails to disclose any such proceeding whatsoever in referance to the other two parties, which we contend to be necessary parties to this proceeding and parties who were entitled to have notice thereof. The Federal Courts have uniformly held, as we understand it, that unless an Order of Severance has been procured by the party making application for the Writ of Error, and unless the same is incorporated in the record, that this is fatal to the jurisdiction of the Appellate Court.

Loveless vs. Ransom, 107 Fed. 627.
Hardy vs. Wilson, 146 U. S. 179, 181; 36 Law. Ed. 933, 934.
Godbe vs. Tootle, 19 Law. Ed. (U. S.) 831.
Estes vs. Trabue, Davis Co., 128 U. S. 229, 32 Law. Ed. 437.
Masterson vs. Howard, 10 Wall. 416, 19 Law. Ed. 953.
Humes vs. Third Nat'l. Bank, 54 Fed. 917.
Foster's Federal Practice, Vol. 3, Page 2449.
Montgomery's Manual of Federal Procedure, 2nd Ed., Chpt. 75, Paragraph 1651, Page 591, and cases there cited.

We submit that our Motion to dismiss the Writ of Error should be granted.

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STATEMENT OF THE CASE.

Without waiving their motion to dismiss the Writ of Error, the defendants in error call attention to the matters argued by the plaintiff in error in her opening brief.

This Honorable Court will see that the attorney for the plaintiff in error specifically disclaimed any interest in the property involved in this case, although he attempted not to do so. See Transcript of Record prepared by the plaintiff in error, Page 76; we quote as follows:

> "MR. BARNES. I am not claiming to be the owner of this property.
>
> MR. FALKNOR: Do you admit that you are not?

MR. BARNES: My answer does not say so. Have you found any place in there where we claim to be the owner?

MR. FALKNOR: You stated awhile ago—then you are disclaiming any interest in the property?

MR. BARNES: I am not disclaiming any interest in the (60) property; I am not disclaiming that; I am saying that this defendant is not claiming to be the owner of this property, and she never did claim to be the owner, but it is upon the plaintiff to prove right of possession."

In this cause, as shown by the supplemental transcript of the record, Edward S. Curtis, by specific bill of sale, sold all the Indian material, including "all the property and assets of every name and nature by him employed in connection therewith, including all copyrights, subscriptions, subscription rights, publications, and material for publication, plates, prints, and printed books, illustrations and material of every name, including choses in action and rights of action". It is apparent that Edward S. Curtis had conceived the idea of publishing twenty volumes of historical character of the Indians in North America, and furnish a portfolio in connection with each volume. He had become very much involved, owing about one hundred thirty-seven thousand dollars, when he entered into a contract with J. Pierpont Morgan for the financing of the deal and the sale of the assets, property

and venture to a corporation known as "The North American Indian". In the prosecution of this work the corporation had expended to the time of trial some eight hundred and fifty thousand dollars in completing eleven volumes of the work; nine volumes yet remained to be completed at the time of trial. It was necessary, in order to complete this work, to have the plates, subscription blanks, and all of the other assets purchased by the corporation. During the time the work was being prosecuted the corporation hired Mr. Curtis to assist them in the work and some of the material was left with him in his studio, the evidence we believe shows some forty thousand negatives, as well as other property which was replevined and seized in this case. Sometime in 1919, we believe, Mr. and Mrs. Curtis became involved in domestic difficulties in the Courts of the State of Washington. They had their daughter in charge of the studio and in charge of the property where the property of the North American Indian was located. Before the institution of this suit demand was made by the attorney for the defendants in error upon the daughter, who was the agent of the Curtises and had the property under her charge. She refused to deliver the same and replevin was instituted and the property taken from their possession by the United States Marshal, who held the same in his possession and deposited it in Room 64 of the Cobb Building, in Seattle, Washington, in charge of his deputy, one "Slade", pend-

ing the disposition and trial on the issues. There being such a voluminous amount of material and plates, the Court appointed an expert, one Mr. Albee, to segregate this material and identify the same with the copyrights which Mr. Curtis had assigned to the corporation, and tabulate the same for better identification in order that no mistake might be made. This was done by the Court for the purpose of expediting the trial. It took Mr. Albee some six weeks or more to go through this property, as he had been ordered to do. If the Court had not made such an order, of course, the trial would have lasted that long a time, or perhaps twice that long, and the expense would have been prohibitive in the trial of the cause.

At the trial the plaintiff in error made no defense whatever, except to introduce a couple of exhibits, determining to frustrate justice in this cause by mere technicalities, and at the same time disclaiming any ownership whatever in the property. This latter, of course, amounted to a disclaimer.

The Court will notice also by the supplement transcript of the record that, according to the contract and bill of sale made by Edward S. Curtis to the North American Indian, he not only sold all of the property then in his possession but agreed to make, execute and deliver good and sufficient assignments of any and all copyrights owned or employed by him in connection with the said business sold at that time, or thereafter obtained by him.

At the time of the trial some contention was made by the plaintiff in error that the North American Indian's corporate existence had ended, although she at no time introduced any specific evidence that under the laws of the State of New York the corporation had not already complied with the laws of New York for continuance of the life of the corporation. The plaintiff below, the corporation, to avoid any question of its right to the possession of the property, on motion, had the Trustees—who were directors of the corporation—added as additional plaintiffs.

No evidence being introduced by the plaintiff in error as to any right, claim, or title she had to any of the property, except what the evidence of the defendants in error had already indicated did not belong to The North American Indian, the Court, on motion of the defendants in error, instructed the jury to return a verdict for the defendants in error for the possession of the property. This was based on the ground, we believe and understand, because the evidence showed that the defendants in error were not only the owners of the property but were entitled to the possession thereof, and particularly due to the fact that the plaintiff in error disclaimed any right of ownership whatever in it.

On the addition of the Trustees, who were residents of the States of New York and Connecticut, the plaintiff in error did not make any contention

as to the diversity of citizenship. (See Transcript of Record proposed by plaintiff in error, Page 78).

A glance at the transcript of the record in this case will show the Court that the plaintiff in error in her answer admitted the value of the property to be $10,000.00.

The Marshal's amended return shows the property was seized in Seattle, in the United States District where the case was tried.

ARGUMENT AND AUTHORITIES

We shall endeavor to answer the many supertechnical objections of the plaintiff in error in the same order as contained in her brief.

In the beginning of this case we must bear in mind that the plaintiff in error, through her counsel in open court at the trial of the cause, admitted that she did not claim the property involved in this cause, and never had claimed it. (Transcript Page 76). There is nothing in the record either that she claims right of possession. It would seem, therefore, that there is no real reason for this proceeding, nor that any one would be benefited thereby.

I.

THE COURT DID NOT ERR IN DENYING MOTIONS OF PLAINTIFF IN ERROR TO QUASH WRIT OF REPLEVIN AND ITS EXECUTION BY THE MARSHAL.

The Statute applicable to claim and delivery, commonly known as a replevin action, of the State of Washington is as quoted by the plaintiff in error in her brief. The complaint of the plaintiff in error, in its last analysis, amounts to this: Because more was done than this Statute required, everything incident to the seizure of the property was void. The defendants in error followed this Statute and, in addition, procured a formal Writ of Replevin from the District Court. This was served upon the plaintiff in error, and the other defendants in the cause, along with a copy of the affidavit for replevin, as well as the bond. All that the Statute required was that the defendants in the cause be served with a copy of the affidavit and a copy of the bond. Plaintiff in error contends, however, that because a copy of the Writ of Replevin was served—and this writ was obtained from the Court—that this action would make the whole proceeding null and void. The mere statement by the plaintiff in error as to her position in reference to that phase, refutes itself. As a matter of fact in this kind of a case, under the State practice, it is not uncommon for a Writ, such as was issued in this cause, to be issued out of the State courts, although it is wholly unnecessary, as the Writ is not required and is superfluous.

The complaint of the plaintiff in error regarding the approval of the bond in replevin by the Judge of the Court instead of by the Marshal, does

not merit serious consideration. The purpose of the Statute requiring a bond to be given is to afford the defendants in a cause security. The surety on a bond such as this could not be heard to say that because the bond was approved by the Judge of the Court instead of by the Marshal that this circumstance would discharge it from its obligation. A plea such as that on the part of the surety would not be noticed, and, the purpose of the Statute having been subserved when the bond was filed in the cause, is all that should be required.

The surety on this replevin bond would be estopped to set up the defense which plaintiff in error intimates might be set up by this surety, and which is the basis of her argument, that no liability exists as to this surety and that the bond is, therefore, void.

> 23 R. C. L., pages 896 and 897, Sections 54 and 55.
>
> *Leeper, Graves & Co. vs. First Nat'l. Bank of Hobart,* 110 Pac. 655, 29 L. R. A. (NS) 747.

Moreover, sureties on a replevin bond are estopped to set up that the bond was not properly accepted and approved as provided by Statute, or filed as provided by Statute, after the property has been placed into the possession of the principal obligor upon the delivery of the bond.

> *Hartlep vs. Cole,* 120 Ind. 247, 22 N. E. 130.
> *Coverdale vs. Alexander,* 82 Ind. 503.

Parker vs. Young, 188 Mass. 600, 75 N. E. 98.
Harrison vs. Wilken, 69 N. Y. 412.

It requires considerable imagination, to say the least, to be convinced that because the Writ of Replevin in this cause was superfluous that the bond given in the cause was void, and that no liability attached thereto. Counsel for plaintiff in error says that the bond was given in order to procure the Writ of Replevin. He is so super-technical in this regard that he confuses himself. An examination of the bond discloses the fact that it was given for the purpose of procuring delivery of the property involved in the action. It makes no referance to the Writ of Replevin, is entirely independant thereof, and, of course, has no relation to the Writ itself, which must be treated merely as unnecessary process, but not, as counsel contends, void and unauthorized.

We may concede that the United States Marshal in this cause might have refused to have executed the Writ of Replevin, and might have refused to seize the property described in the affidavit for replevin—if he had seen fit to do so—until the bond, which had theretofore been filed with the Clerk of the United States District Court, had been approved by him. It is safe to assume that this officer knew of the bond, knew of its approval by the Judge, and was satisfied to act upon the matter as it came to him. Counsel for plaintiff in error does not endeavor to point out in what manner additional life

would have been given to this bond had it been stamped "approved" by the United States Marshal. All that the Statute means in referance to the approval of the bond by the officer serving it, is that that officer, who is charged with the seizure of the property called for in the affidavit for replevin, has the right to determine for himself the sufficiency of the sureties upon the bond. The statute merely gives him that privilege. Could it be said with any show of reason that, because the seizing officer did not approve the bond, the bond thus became void and the seizure illegal and void. This is not the meaning of the Statute, and after the Marshal has seized the property by virtue of the process placed in his hands, which consisted of all that the law required and also an unnecessary Writ—which damaged no one—the requirements of the Statute were met, and no error was commited by the Court in denying the motion to quash the Writ of Replevin, or its execution by the Marshal. Plaintiff in error could have followed the procedure which the Statute allowed her if she had seen fit. She was not prevented from excepting to the sufficiency of the surety, nor was she prevented from giving counter-bond if she had seen fit to do so. She did not claim the property, under the admissions of her attorney in open Court, and it is difficult to conceive how she can be deprived *of her property* without due process of law *when she claimed no interest therein.*

We consider it our duty to pay our respects to the alleged authorities which the plaintiff in error cites on this branch of the case.

Scott vs. McGraw, 3 Wash. 678,

decides nothing that is in any way applicable to this case.

The Virginia case of

B. & O. R. Co. vs. Hamilton, 16 Fed. 181,

a case peculiarly relied upon by plaintiff in error as substantiating her position, must be noticed, not because it is in point or has any bearing on this case at all, but as being significant of the authority which plaintiff in error submits as being helpful to this Court on this contention. An examination of the Virginia case discloses the fact that there is no provision in the law of the State of Virginia which permits an action either of claim and delivery or of replevin. It was for this reason that the Writ of Replevin was dismissed and not for the reason that the Writ was used when it was unnecessary, such as was done in this case. The case of

Hicks vs. Mendenhall, 17 Minn. 475, and
Rosen vs. Fischell, 44 Conn. 371,

are in no way applicable to the branch of the case on which they are submitted as authority. In those cases the Courts issuing the process were wholly without jurisdiction to issue the process which it purported to issue. This was not true in the present

case. We do not think that it is proper to say that the Writ of Replevin which was issued in the case at bar was unauthorized. We do concede that it was unnecessary, but we strenuously resist the assertion that it was not proper or unauthorized. We invite the Court's only casual consideration of the authorities submitted by the plaintiff in error as to the correctness of her position on this phase of the case, for we feel that the most casual glance at these authorities will demonstrate to the Court the utter inapplicability of the principles involved in those cases, and decided by those cases, to the facts of the case at bar. Moreover, the principle decided in the Minnesota case and the Connecticut case is the ancient rule and has been departed from by the courts in those states, and the rule announced is no longer followed by the courts, except by a decided minority.

II.

PLAINTIFF'S EXHIBIT 15.

Very little notice need be had of this Assignment, because it will be covered by our argument on the next phase of the case. Plaintiff in error, however, prefaces her argument in reference to the alleged error on the part of the trial court in admitting this Exhibit in evidence, as follows:

> "Plaintiff in error, having *specifically denied* the allegation of the complaint that the plaintiff therein was a corporation organized and

existing,'' etc.,

and goes on to state that the burden was thereupon cast upon the defendants in error to prove the corporate existence. The Court will notice later on that the effect of a pleading of this kind amounted to an admission, under the law, of the corporate existence and rendered it unnecessary for the defendant in error to introduce any testimony whatsoever in regard to the corporate existence. The Exhibit was certainly admissible in evidence under the principles of the Washington case of

State ex rel Clark vs. Superior Court, 114 Pac. 444.

Certainly the receipt of the Secretary of State of the State of New York for the franchise license tax was admissible as a receipt, and both instruments were admissible as public records. The ground for the objection of counsel to the introduction of this Exhibit (See Transcript Page 67) does not now permit her to urge the reasons for the alleged error which she now sets forth in her brief. Her objection was based upon the ground that the Exhibit was not properly authenticated. It certainly would have been proper for the defendants in error to have identified this Exhibit as being what it purported to be, assuming that that was necessary, and this they could have done if the plaintiff in error had incorporated that in her objection, but this she did not do, and we feel that no error was committed by his Honor in admitting the

Exhibit.

The Court, however, will understand that we most emphatically contend that the introduction of this Exhibit was not necessary to prove the existence of the North American Indian as a corporation, in view of the pleading of the plaintiff in error herself and for the reason that she had estopped herself from questioning the corporate existence of the North American Indian, Inc., as we shall now notice.

III.

THE ADDITION OF PARTIES PLAINTIFF.

Plaintiff in error complains strenuously about the action of the trial Court in adding as additional parties plaintiff the Trustees of the corporation at the time of trial. The Judiciary Code permitted this procedure, as well as did the Statutes of the State of Washington. Revised Statutes, Section 948, reads as follows:

> "Sec. 948 (Amendment of process). Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues."

Revised Statutes, Section 954, reads as follows:

"Sec. 954. (Defects of form—amendments).

No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such refect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

Remington & Ballinger's Annotated Codes, Statutes of the State of Washington, Section 303, provides as follows:

"Sec. 303. Amendments, Allowance of. The Court may, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may, upon like terms, enlarge the time for answer or demurrer. The Court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just,

> an amendment to any pleading or proceeding in other particulars, and may, upon like terms, allow an answer to be made after the time limited by this code, and may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

By virtue of Section 948, it has been held that the real plaintiff in an action may be substituted for a nominal one, in whose name the action was brought.

The Court, in the case of

> *McDonald vs. State of Nebraska,* 101 Fed. 171, 41 C. C. A. 278,

used the following language, which is particularly appropriate to this situation, found on Page 178 of the opinion:

> "A defendant has an undoubted right to insist that the person entitled to recover on a cause of action set forth in a petition shall be brought on the record as the plaintiff in the action, to the end that he shall not be compelled to respond twice to the same demand; and that the one suit shall bar all others for the same cause of action. But it has come to be the settled law that where, either by mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defend-

ant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff has relation to he commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff. The name of the proper plaintiff may be brought on the record at any time during the progress of the cause, and may even be inserted after verdict and judgment. When a wrong party has been named as plaintiff, the action will never be dismissed, and the proper plaintiff required to bring a new action, when the effect would be to let in the bar of the statute of limitations."

And by virtue of the same Statute it was held in

Clemens vs. Washington Park Steamboat Co., 171 Fed. 168,

that even after trial and judgment and an attempt had been made to collect a judgment recovered against a corporation of a similar name as the defendant, but which in truth and in fact was not the defendant in the cause—but which had really defended the action and, in fact, appeared—and there being no such person as the defendant named, that the trial Court had power to substitute the real defendant in the cause. To the same effect is

Bainum vs. American Bridge Company, 141 Fed. 179.

The attention of the Court is also especially invited to the case of

Davis vs. Seattle, 37 Wash. 223, 79 Pac. 784.

The Court in that case, among other things, used the following language, which is particularly appropriate to the situation in this cause:

> "The Court has held in *Hawkins vs. Front Street Cable Ry. Co.,* 3 Wash. 592, that an action for damages based on personal injuries sustained by the wife, must be brought in the name of the husband, and that the wife, while not a necessary party is a proper party to such action. While the respondent, Alice J. Davis, could not have recovered in this action suing alone, did the Court commit error in permitting the amendment whereby the husband, B. W. Davis, was made a party plaintiff, and afterwards with his wife recovered judgment? Sec. 424 Pierce's Code, Section 4953, Ballinger, provides: 'The Court may, in furtherance of justice and on such terms as may be proper, amend any pleadings or proceedings, by adding or striking out the name of any party,' etc. We think that under this section and under the circumstances of this case the amendment was properly allowed. Appellant did not claim any surprise, made no request for a continuance, no new issues requiring additional preparation for trial were formed, unnecessary delay and loss of time were avoided; there was no material change in the cause of action or in the defense; and no abuse of discretion by the court was shown. The amendment was certainly in 'furtherance of justice,' was properly allowed, and was not erroneous. *Hulbert vs. Brackett,* 8 Wash. 438; *McDonough vs. Great Northern Ry. Co.,* 15 Wash. 244; *Allend vs. Spokane*

Falls & N. Ry. Co., 21 Wash. 324; *Morrissey vs. Faucett,* 28 Wash. 52; *Daly vs. Everett Pulp & Paper Co.,* 31 Wash. 255; *Thomas vs. Price,* 33 Wash. 459."

In the Missouri case of

Hackett vs. Van Frank, 96 S. W. 247,

it was held that where a suit or a cause of action in favor of a corporation was commenced in the name of the stockholders of the corporation, and the owners of all of the corporate stock, that an amendment was permissible and should have been allowed, which substituted the corporation itself as plaintiff instead of the stockholders, and that the same was not objectionable as changing the cause of action. There is also ample authority for permitting a suit to be waged by amendment in the name of the stockholders of a corporation after it has been instituted by the corporation itself, which had no legal existence at the time of the institution of the suit.

3 *Thompson on Corporations,* Section 3157.
Vermont Mining, Etc., Company, et al, vs. Windham Co. Bank, et al, 44 Vt. 489.

There can be no question but what it was within the discretion of the Court in granting the petition of Pegram and Borglum to be made additional parties plaintiff, not only in the interest of justice but for the purpose of avoiding multiplicity of suits, and for the purpose of disposing of the con-

troversy when all parties at interest were before the Court.

We do not believe, and never have felt, that it was necessary under the circumstances of this case for these men to have been made parties, but through an abundance of caution the procedure was adopted. Plaintiff in error at the time of trial and in her argument on this phase of the case, was permitted, over the objection of the defendants in error, to question collaterally the existence of the North American Indian, Inc., as a corporation, and she was permitted by the trial Court for the purpose of making her record to do so. There was testimony in the case ample to show business dealings of great magnitude between the corporation and the plaintiff in error and her former husband, Edward S. Curtis, which tranactions took place both before and after the martial difficulties between these two parties. Under such circumstances, neither of them could deny, under the overwhelming weight of authority, the corporate existence of the plaintiff in that action. Under such circumstances, both the plaintiff in error, and her former husband, was estopped from questioning the corporate capacity of the corporation with which they dealt.

In re Western Bank & Trust Co., 163 Fed. 713,

Kelleher vs. Denver Music Co., 109 Pac. 860,

and the multitude of cases cited in both of these opinions.

In addition, the plaintiff in error is not in a position to urge the fact that the North American Indian had ceased to exist, or that its charter had lapsed, for the reason that she has foreclosed herself from so doing by her own answer in this cause. By her answer (Transcript Page 8) she has contented herself with simply denying the allegation in reference to the corporate existence of the defendant in error. Under all of the authorities, the denial generally of the existence of a corporation, admits such corporate existence.

Union Cement Co. vs. Noble, 15 Fed. 502.
Pullman vs. Upton, 96 U. S. 328, 24 L. Ed. 818,
Emerson Co. of West Virginia vs. Nimocks, 88 Fed. 280.

Under these decisions the general denial of corporate existence does not put in issue either the corporate capacity to sue or the corporate existence. See also

Hodges vs. Kimball, 91 Fed. 845,

in which case the Court, on Page 848, used the following language:

> "The plea to the merits of the general issue in this case unquestionably admitted the representative capacity of the plaintiffs and their rights to institute and maintain the suit." (citing authority).

See also

3 *Thompson on Corporations,* Sections 3221, 3223 and 3224.

Bank vs. Patchin Bank, 13 N. Y. 309.

First Nat'l. Bank vs. Gibson, 84 N. W. (Nebr.) 259.

Conrad vs. Atlantic Insurance Co., 1 Peters (U. S.) 450.

Society vs. Pawlet, 4 Peters (U .S.) 500.

For the reasons stated, the plaintiff in error is in no position and cannot question the corporate existense of the North American Indian, Inc., for by her own pleading she has admitted its existence. If we are correct in this assertion the making of the additional parties plaintiff was unnecessary, but it did not operate to the prejudice of the plaintiff in error, and she should not be heard to complain. At the time of trial she did not claim surprise, nor ask for time in which to meet any additional issue which this action of the Court could possibly have injected into the case.

In addition, there was evidence which showed a presumption of corporate existence. There is the certificate of the Secretary of State of the State of New York as a corporation of the North American Indian, Inc., and the payment of the franchise license tax, evidenced by plaintiff's Exhibit "15". The plaintiff in error read into the case the Statute of the State of New York, which provided for an extention of the corporate existence of a domestic corporation (Transcript Page 71). In the absence of proof to the contrary, it seems to us that the ex-

tension of the corporate existence must be presumed in the face of the payment of the franchise license tax to a date subsequent to the original expiration of the corporate charter. Public officers are presumed to do their duty, and the legal presumption surely would be that they would not accept this franchise tax from a corporation that had ceased to exist. The fact of the corporation having been shown, the burden of showing a dissolution of the corporation would rest upon those who wished to establish such dissolution and who are in a position to urge such a question.

Regents vs. Williams, 31 Am. Dec. 74.

The acceptance by the State of New York of the license tax would be a recognition by that state of the existence of this corporation, and this would establish the corporate existence.

1 *Thompson on Corporations,* Section 170.

In addition, the validity of the existence of a corporation may not be inquired into in actions instituted for the protection of the rights and property of a corporation, nor in an action by such a corporation for trespass by wrongfully taking property from its possession.

1 *Thompson on Corporations,* Section 251.

Whether or not a corporate charter has expired by limitation is a question which cannot be adjudicated in a collateral proceeding. It can only be

raised in a direct proceeding between the sovereign power and the corporation.

> *St. Louis Gas Light Co. vs. City of St. Louis,* 84 Mo. 202, affirming 11 Mo. App. 55.
> *St. Louis vs. Shields,* 62 Mo. 247-251.

The evidence introduced was sufficient to establish at least prima facie proof of the existence of the North American Indian, Inc.

> *State ex rel Clark vs. Superior Court,* 114 Pac. 444.

The receipt for the payment of the franchise tax and the evidence before the Court, showed unquestionably that the North American Indian, Inc., had been exercising the functions of a corporation since December 1919, and that it, as a matter of fact in any event, was a de facto corporation, and, under the law, it was both entitled to sue, and be sued. The case of

> *Miller's Adm'x vs. Newburg Orrel Coal Co.,* 8 S. E. 600,

a West Virginia case, is particularly applicable, and, we think, conclusive on this branch of the case. The Court in the course of the opinion, on Page 601, used the following language:

> "The important question to be determined in this case is whether or not a duly incorporated and organized corporation, which continues its corporate business in its corporate name after the time fixed by its charter for its duration has

expired, can be sued and made liable as a corporation de facto for a tort committed by it after the limit fixed by its charter had expired. At common law, upon the death or dissolution of a corporation its real estate reverted to the grantors or donors, and its personal property escheated to the king, while the debts due to and from it were thereby extinguished, and all actions pending for or against it at the time abated. *Rider vs. Factory,* 7 Leigh. 154; *Board vs. Livesay,* 6 W. Va. 44; *Mumma vs. Potomac Co.,* 8 Pet. 281."

And on Page 602 used the following very appropriate observation:

"In respect to the Newburg Orrel Coal Company—the corporation now in question—there can be no doubt that it was the duty of the directors, under the provisions of this statute, to wind up its business when its charter expired; but the facts show that they did not do so. On the contrary, the corporation continued to prosecute its business in its corporate name just as it had done before its charter expired. It continued to exist, as a matter of fact, after its franchise or legal right to exist had expired. It thus became a corporation de facto, but not de jure. As such de facto corporation it certainly possessed no special powers, such as the power to condemn property, and other like powers, which the law confers only upon corporations existing by legal right. But the courts cannot reasonably ignore the existence of such a corporation, if it is an immutable

> fact; nor are the acts and dealings had by and with it necessarily legally ineffective and of no binding force. 2 Mor. Priv. Corp. Sec. 1002, 1003; *Gas Light Co. vs. City of St. Louis,* 11 Mo. App. 55; *Briggs vs. Canal Co.,* 137 Mass. 71. The scope of the powers of the officers and agents of a corporation de facto must be fixed in the same manner as in case of a corporation de jure."

We finally contend on this phase of the case that plaintiff in error cannot urge error on the part of the Court in this regard:

1. On account of her dealings with the corporation.

2. Because she has foreclosed herself by her own pleadings.

3. That if the addition of the sole directors, Pegram and Borglum, as additional parties plaintiff was not necessary, it would be error without prejudice; that if they were necessary it was proper for the Court to interplead them in the case, as was done.

IV and V.

DIRECTED VERDICT.

As the record stood at the close of the case and after the additional parties had been aligned therein, there was no controverted fact to be submitted to the jury and the Court could do nothing else but grant the motion of the defendant in error for a di-

rected verdict. The plaintiff in error offered no evidence whatsoever as to the parts which she played in the detention in reference to the property of the defendants in error. The evidence was sufficient to at least show a constructive possession and detention on her part. It showed specifically the unlawful detention of the property by her co-defendant and former husband, Edward S. Curtis (Transcript Pages 63-64). It also showed the fact that plaintiff in error at that time claimed some property right to the premises where the property in dispute was kept. At that time the community existing between plaintiff in error and her former husband had not been finally dissolved by the Courts of the State of Washington, and the possession of her former husband—who was the business manager of the community existing between them—would be the possession of the plaintiff in error. The testimony was ample that a demand for the possession of this property was made by an authorized representative of the defendants in error, and this demand was refused by the representatives of the plaintiff's in error former husband, and between whom domestic litigation had not been finally terminated.

Much stress is laid on this phase of the case by plaintiff in error in regard to the fact that the verdict in the cause, as directed by the Court, does not describe the property with such definiteness and certainty that it might be clearly identified. We submit that the description of the property and the

property itself is sufficiently identified by the verdict under the authority of

Casey vs. Malidore, 19 Wash. 279, 53 Pac. 50.

In the beginning, defendant in error in its complaint set forth the property unlawfully detained and which it sought to recover. It is true that in its complaint it did not itemize and name the various positives and negatives. It simply described them as "a large assortment of Indian negatives, transparencies, records and manuscripts." The return of the Marshal follows the description of the property as contained in the complaint and in the affidavit for replevin somewhat more in detail. The Court will understand that all of this property was stored in Room 64 of the Cobb Building, in the City of Seattle, and during the time of trial thereafter was commonly referred to as being the property involved in the suit. This property, after it was stored, was afterward checked by a man appointed by the Court to assist the Court in identifying the property with the transfer hereof from Edward S. Curtis to the defendant in error (Transcript 46-51). The property was all identified by Edward S. Curtis himself (Transcript 69), and it does not seem to us that the description of the property in the verdict as being all of the property replevined by the Marshal, whose return of such seizure thereof was then on file, would be improper. To say that it would be necessary during all of these proceedings to have specifically itemized something over

38,000 negatives and transparencies by name would have made this proceeding so burdensome that no party would undertake the same. Such is not the policy of the Courts, and a suggestion thereof indicates the lack of merit on the part of the plaintiff in error in suggesting it. Plaintiff in error concedes that if the property is described in the complaint the description in the verdict may be made by reference to the complaint. We cannot gather any distinction between this and a reference to the property seized by the Marshal, and the reference thereafter in the verdict being made to his return, particularly when the return shows on its face sufficiently to convince any person with common understanding that the property referred to in the Marshal's return is the identical property referred to in the complaint and the affidavit for replevin.

It is also contended that the verdict was fatally defective in that it did not find the value of the property referred to therein. Again the pleading of the plaintiff in error confronts her and is a complete answer to the very error which she is urging. Her answer specifically admitted that the value of the property was $10,000.00 (Transcript Page 8). In addition, the affidavit for replevin sets forth the value of the property as being $10,000.00 (Transcript Pages 15 and 16), and this at no time was controverted by the plaintiff in error, or her co-defendant by any testimony. Under such circum-

stances the law is well settled that there is no issue to be submitted to the jury as to the value of the property involved in the suit.

Peterson vs. Woolery, 9 Wash. 390, 37 Pac. 416.

Winton Motor Carriage Co. vs. Blomberg, 84 Wash. 451, 147 Pac. 21.

There is also some contention that because the verdict in this cause was not in the alternative, either for the return of the property or for the value thereof, that it is for that reason void. An examination of the record in this cause, and particularly the petition of the plaintiff in error in the Court below for a new trial (Transcrips Pages 82-87), will fail to disclose that such ground was urged in the lower Court, or called to the Court's attention. Under such circumstances the law is that the verdict is sufficient without being in the alternative.

McGraw vs. Franklin, 2 Wash. 17.

There are many other trivial technicalities injected by plaintiff in error on this branch of the case, but they were all submitted to the trial Court and argued at length by counsel for plainiff in error and the patience of the trial Court exhausted, and we do not feel disposed to answer them in detail.

VI.

Plaintiff in error halfheartedly contends that the Court erred in taking from the the jury the right

to pass upon the jurisdictional issue of the diversity of citizenship and the existence of the plaintiff corporation. The complete answer to that is, that the pleadings admitted the diversity of citizenship, and the previous argument disposes of the existence of the plaintiff corporation.

Moreover, the record affirmatively shows that at no time did the plaintiff in error contend that the sole trustees, who were made additional parties plaintiff to the action, were not residents respectively of the State of New York and the State of Connecticut, which would, of course, of necessity, and of itself, established diversity of citizenship. (Transcript Page 78).

VII.

The error assigned on the action of the Court in denying motion of plaintiff in error for a new trial, and the argument thereon, of course, is merged in all the previous assignments, and no discussion need be advanced thereon.

VIII.

Plaintiff in error uses much space in urging that the judgment entered is void. She prefaces this assertion and bases her argument on the fact that the North American Indian, Inc., had been dissolved long before the demand for possession, or the commencement of the action, and that, therefore, any judgment in its favor, or any judgment to which

it was a party, is an absolute nullity.

Our previous observations in reference to the estoppel of the plaintiff in error to question the corporate existence of the North American Indian, Inc., likewise applies to this phase of the case with all its vigor as it does to the branch of the case to which it was previously applied. What difference can it make to the plaintiff in error, in any event. The judgment as entered in this cause conforms to the verdict, and reasonable sensible minds cannot differ thereon. Plaintiff in error consumes considerable space in criticizing the language of the judgment, but it amounts to nothing more than a super-technicality and haggling over the English language. There can be no reason for questioning the description of the property as being "all of the property replevined by the Marshal" and "all of the property replevined by the plaintiff and seized by the Marshal and now located", etc. We have heretofore shown that the property was sufficiently described and that no one has been misled at any time thereby. This should be sufficient to substantiate the judgment. There is some argument contained on this phase of the case that there were certain items of property set out in the plaintiff's complaint that the Marshal was not able to find, and also that there were certain articles of property seized by the Marshal which were not mentioned in the pleadings, nor called for in the affidavit of replevin, and for this reason it is contended that the

seizure by the Marshal of all of the property would fail. The mere statement of an assertion so ridiculous is the answer to the same. It is easy to understand how the officer seizing such a volume of property as was seized in this case might neglect to secure some of the property mentioned in the complaint and the affidavit for replevin, and it is likewise as comprehensible how the levying officer might also seize property intermingled with the chattels involved in the action unintentionally. This was done in this case, and the Marshal did seize property, which the defendants in error did not claim, of the value of $9.50, which value was not controverted by the plaintiff in error, or by any other evidence. This latter property was excepted from the judgment and the Court decreed that the defendant in error should return the same to the Curtis Studio, or pay the value thereof. This is the usual procedure in such cases and it is beyond our comprehension as to why any complaint should be made in that regard. In the last analysis the judgment follows the verdict and the pleadings and no person of common understanding can be misled thereby. For the reasons which we have indicated before we do not believe that it was necessary to have specifically itemized the various articles in the judgment, and that the reference to the Marshal's return contained in the said judgment was entirely sufficient.

In closing, we simply say that we trust that the

Court will give to the authorities cited by the plaintiff in error just such consideration as they are entitled to as being controlling of the issues in this case. Some of the authorities contain assertions upon some principles of law not applicabe to the the law and facts in this case—that on a cursory examination would appear to have some weight—but, considering the mass that we have been compelled to wade through, we have no hesitancy in saying that substantially all of the authorities of the plaintiff in error have reference to some other principle of law that is not involved in this cause in any way. If we had felt that it would have been of assistance to your Honors in dealing more in detail with the authorities of the plaintiff in error, we would have done so, but such action on our part would have extended this argument far beyond the realm of reasonable indulgence, and would have been unnecessarily burdensome to the Court, and, probably, of very little assistance. We are confident that this Court, upon examination of the authorities of the plaintiff in error, will view them in the same light in connection with the record in this cause as do we, and for that reason we have passed them by without further notice.

This case, from its beginning to the end, has been impeded by the plaintiff in error in this cause by every plea, technicality and objection known to the law, simply for the purpose of venting her spleen upon a business institution which at one time

was so unfortunate as to enter into business negotiations with the plaintiff in error and her former husband, with whom she became estranged. It in no wise was responsible for the domestic difficulties which befell them. She does not claim the property involved in this action and, as stated by her counsel, never did claim it, but in the face of this statement contests the rightful owner's right of title and possession thereto from beginning to end.

We submit that the Writ of Error should be dismissed for the reasons first stated herein, and, in any event, it should be dismissed for the reason that there can be no cause for controversy over property which is admittedly the property of the defendants in error, and to which the plaintiff in error has disclaimed any ownership through her own counsel in open Court. We can conceive of no appellate proceeding having less merit than the one involved in this action, and respectfully submit that the judgment of the lower Court should should be affirmed.

Respectfully submitted,

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